**European Court of Justice, 23 November 1999, Portugal v Council**

v


**LITIGATION – direct effect WTO agreements**

**Direct effect**

- **No direct effect WTO agreements, except where the Community intended to implement a particular obligation.**

That having regard to their nature and structure, the WTO agreements are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions.
That interpretation corresponds, moreover, to what is stated in the final recital in the preamble to Decision 94/800, according to which 'by its nature, the Agreement establishing the World Trade Organisation, including the Annexes thereto, is not susceptible to being directly invoked in Community or Member State courts'.
It is only where the Community intended to implement a particular obligation assumed in the context of the WTO, or where the Community measure refers expressly to the precise provisions of the WTO agreements, that it is for the Court to review the legality of the Community measure in question in the light of the WTO rules

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**European Court of Justice, 23 November 1999**
(J.C. Moitinho de Almeida, D.A.O. Edward, L. Sevón, . Schintgen, P.J.G. Kapteyn, C. Gulman, J.-P. Puissochet, G. Hirsch, P. Jann, H. Ragnemalm and M. Wathelet)
JUDGMENT OF THE COURT
23 November 1999 (1)
(*Commercial policy - Access to the market in textile products - Products originating in India and Pakistan*)
In Case C-149/96,
Portuguese Republic, represented by L. Fernandes, Director of the Legal Service of the European Communities Directorate-General in the Ministry of Foreign Affairs, and C. Botelho Moniz, assistant in the Faculty of Law of the Portuguese Catholic University, acting as Agents, with an address for service in Luxembourg at the Portuguese Embassy, 33 Allée Scheffer,
applicant,
v
Council of the European Union, represented by S. Kyriakopoulou, Legal Adviser, and I. Lopes Cardoso, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of A. Morbilli, General Counsel in the Legal Affairs Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer,
defendant,
supported by
French Republic, represented by C. de Salins, Deputy Director for International Economic Law and Community Law in the Department of Legal Affairs at the Ministry of Foreign Affairs, and G. Mignot, Secretary for Foreign Affairs in the same Department, acting as Agents, with an address for service in Luxembourg at the French Embassy, 8B Boulevard Joseph II,
and
Commission of the European Communities, represented by M. de Pauw and F. de Sousa Fialho, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the Chambers of C. Gómez de la Cruz, of the same Legal Service, Wagner Centre, Kirchberg,
interveners,
APPLICATION for annulment of Council Decision 96/386/EC of 26 February 1996 concerning the conclusion of Memoranda of Understanding between the European Community and the Islamic Republic of Pakistan and between the European Community and the Republic of India on arrangements in the area of market access for textile products (OJ 1996 L 153, p. 47),
THE COURT,
composed of: J.C. Moitinho de Almeida, President of the Third and Sixth Chambers, acting for the President, D.A.O. Edward, L. Sevón and R. Schintgen (Presidents of Chambers), P.J.G. Kapteyn (Rapporteur), C. Gulman, J.-P. Puissochet, G. Hirsch, P. Jann, H. Ragnemalm and M. Wathelet, Judges,
Advocate General: A. Saggio,
Registrar: H. von Holstein, Deputy Registrar,
having regard to the Report for the Hearing,
after hearing oral argument from the parties at the hearing on 30 June 1998,
after hearing the **Opinion of the Advocate General** at the sitting on 25 February 1999,
gives the following
**Judgment**
1. By application lodged at the Court Registry on 3 May 1996, the Portuguese Republic brought an action under the first paragraph of Article 173 of the EC Treaty (now, after amendment, the first paragraph of Article 230 EC) for the annulment of Council Decision 96/386/EC of 26 February 1996 concerning the conclusion of Memoranda of Understanding between the European Community and the Islamic Republic of Pakistan and between the European Community and the Republic of India on arrangements in the area of market access for textile products (OJ 1996 L 153, p. 47, 'the contested decision').
**Legal and factual background**
**International multilateral agreements in the Uruguay Round**

2. On 15 December 1993 the Council unanimously approved the terms of the global commitment on the basis of which the Community and the Member States agreed to end the multilateral trade agreements of the Uruguay Round ('the agreement of principle').
3. On the same day, the Director General of the General Agreement on Tariffs and Trade ('GATT'), Mr Sutherland, announced in Geneva to the committee for multilateral negotiations the closure of the negotiations of the Uruguay Round. In doing so he invited some of the participants to pursue their negotiations on access to the market, with a view to reaching a more complete and better balanced 'market access' package.
4. Following the closure of those negotiations the negotiations on market access for textile and clothing products ('textile products') with, inter alia, the Republic of India and the Islamic Republic of Pakistan were pursued by the Commission, with the assistance of the 'textile committee 113' of the Council ('the textile-committee') designated by the Council to represent it in matters concerning the common commercial policy of the Community in the textile sector.
5. On 15 April 1994, at the Marrakesh meeting in Morocco, although the negotiations on access to the market in textiles had not yet been completed with Pakistan and India, the President of the Council and the Member of the Commission responsible for external relations signed the Final Act concluding the multilateral trade agreements of the Uruguay Round ('the Final Act'), the Agreement establishing the World Trade Organisation ('the WTO') and all the agreements and memoranda in Annexes 1 to 4 to the agreement establishing the WTO ('the WTO agreements') on behalf of the European Union, subject to subsequent approval.
6. Among those agreements, included in Annex 1 A to the agreement establishing the WTO, are the Agreement on Textiles and Clothing ('the ATC') and the Agreement on Import Licensing Procedures.
7. Following the signature of those measures the Council adopted Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1).

**The agreements concluded with Pakistan and India**

8. Following the signature of the WTO agreements negotiations with India and Pakistan continued; they were conducted by the Commission with the assistance of the textiles committee.
9. On 15 October and 31 December 1994 the Commission, and India and Pakistan respectively, signed two 'Memoranda of Understanding' between the European Community and India and Pakistan on arrangements in the area of market access for textile products.
10. The Memorandum of Understanding with Pakistan contains a number of commitments on the part of both the Community and Pakistan. In particular, Pakistan undertakes to eliminate all quantitative restrictions applicable to a series of textile products listed specifically in Annex II to the Memorandum of Understanding. The Commission undertakes 'to give favourable consideration to requests which the Government of Pakistan might introduce in respect of the management of existing [tariff] restrictions for exceptional flexibility (including carry-over, carry-forward and inter-category transfers)' (point 6) and to initiate immediately the necessary internal procedures in order to ensure 'that all restrictions currently affecting the importation of products of the handloom and cottage industries of Pakistan are removed before entry into force of the WTO' (point 7).
11. The Memorandum of Understanding with India provides that the Indian Government is to bind the tariffs which it applies to the textiles and clothing items expressly listed in the Attachment to the Memorandum of Understanding and that '[t]hese rates will be notified to the WTO Secretariat within 60 days of the date of entry into force of the WTO'. It is also provided that the Indian Government may 'introduce alternative specific duties for particular products' and that these duties will be indicated 'as a percentage ad valorem or an amount in Rs per item/square metre/kg, whichever is higher' (point 2). The European Community agrees to 'remove with effect from 1 January 1995 all restrictions currently applicable to India's exports of handloom products and cottage industry products as referred to in Article 5 of the EC-India agreement on trade in textile products' (point 5). The Community undertakes to give favourable consideration to 'exceptional flexibilities, in addition to the flexibilities applicable under the bilateral textiles agreement, for any or all of the categories under restraint', up to the amounts for each quota year indicated in the Memorandum of Understanding for 1995 to 2004 (point 6).
12. On a proposal from the Commission dated 7 December 1995, the Council adopted on 26 February 1996 the contested decision, which was approved by a qualified majority; the Kingdom of Spain, the Hellenic Republic and the Portuguese Republic voted against it.
13. The understandings with India and Pakistan were signed on 8 and 27 March 1996 respectively.
14. The contested decision was published in the Official Journal of the European Communities on 27 June 1996.

**Community legislation**

15. Council Regulation (EEC) No 3030/93 of 12 October 1993 on common rules for imports of certain textile products from third countries (OJ 1993 L 275, p. 1), as amended by Council Regulation (EC) No 3289/94 of 22 December 1994 (OJ 1994 L 349, p. 85), lays down rules governing imports into the Community of textile products originating in third countries which are linked to the Community by agreements, protocols or arrangements, or which are members of the WTO.
16. Thus, according to Article 1(1) thereof, the Regulation applies to imports of textile products listed in Annex I originating in third countries with which the Community has concluded bilateral agreements, protocols or other arrangements as listed in Annex II.
17. Article 2(1) of the regulation provides that the importation into the Community of the textile products listed in Annex V originating in one of the supplier

countries listed in that annex is to be subject to the annual quantitative limits laid down in that annex. Under Article 2(2), the release into free circulation in the Community of imports subject to the quantitative limits referred to in Annex V is to be subjectto the presentation of an import authorisation issued by the Member States' authorities in accordance with Article 12.

18. Article 3(1) provides that the quantitative limits referred to in Annex V are not to apply to the cottage industry and folklore products specified in Annexes VI and VIa which are accompanied on importation by a certificate issued in accordance with the provisions of Annexes VI and VIa and which fulfil the other conditions laid down therein.

19. On 10 April 1995, pursuant to what had been agreed in the agreement of principle (paragraph 2 of this judgment) the Council, on a proposal from the Commission, adopted Regulation (EC) No 852/95 on the grant of financial assistance to Portugal for a specific programme for the modernisation of the Portuguese textile and clothing industry (OJ 1995 L 86, p. 10).

20. On 20 December 1995 the Commission adopted Regulation (EC) No 3053/95 amending Annexes I, II, III, V, VI, VII, VIII, IX and XI of Regulation No 3030/93 (OJ 1995 L 323, p. 1). According to the fourteenth and sixteenth recitals in the preamble to that regulation, the fact that the arrangement with India as regards access to the market envisaged the abolition of quantitative restrictions on the importation of certain folklore and cottage industry products originating in India was one of the factors which led to the amendment of those annexes as from 1 January 1995.

21. The fifth and sixth indents of Article 1 of Regulation No 3053/95 replace Annex VI to Regulation No 3030/93 by a new Annex V to Regulation No 3053/95, and repeal Annex VIa to that regulation as from 1 January 1995.

22. As Regulation No 3053/95 was vitiated by a procedural defect, the fifth and sixth indents of Article 1 were withdrawn with retroactive effect from 1 January 1995 byCommission Regulation (EC) No 1410/96 of 19 July 1996 concerning the partial withdrawal of Regulation No 3053/95 (OJ 1996 L 181, p. 15, hereinafter 'the withdrawal regulation‘). According to the first recital in the preamble to the withdrawal regulation, the amendments provided for in the fifth and sixth indents of Article 1 of Regulation No 3053/95 had been adopted at a time when, by virtue of Article 19 of Regulation (EEC) No 3030/93, the Commission was not yet entitled to adopt them, the Council not yet having decided to conclude or apply provisionally the arrangements negotiated by the Commission with India and Pakistan concerning access to the market in textile products.

23. By Regulation (EC) No 2231/96 of 22 November 1996 amending Annexes I, II, III, IV, V, VI, VII, VIII, IX and XI of Regulation No 3030/93 (OJ 1996 L 307, p. 1), the Commission adapted Regulation No 3030/93 to the Memoranda of Understanding.

**Substance**

24. In support of its application, the Portuguese Republic relies, first, on breach of certain rules and fundamental principles of the WTO and, second, on breach of certain rules and fundamental principles of the Community legal order.

**Breach of rules and fundamental principles of the WTO**

25. The Portuguese Government claims that the contested decision constitutes a breach of certain rules and fundamental principles of the WTO, in particular those of GATT 1994, the ATC and the Agreement on Import Licensing Procedures.

26. It claims that according to case-law it is entitled to rely on those rules and fundamental principles before the Court.

27. Although the Court held in Case C-280/93 Germany v Council [1994] ECR I-4973, paragraphs 103 to 112, that the GATT rules do not have direct effect and that individuals cannot rely on them before the courts, it held in the same judgment that that does not apply where the adoption of the measures implementing obligations assumed within the context of the GATT is in issue or where a Community measure refers expressly to specific provisions of the general agreement. In such cases, as the Court held in paragraph 111 of that judgment, the Court must review the legality of the Community measure in the light of the GATT rules.

28. The Portuguese Government claims that that is precisely the position in this case, which concerns the adoption of a measure - the contested decision - approving the Memoranda of Understanding negotiated with India and Pakistan following the conclusion of the Uruguay Round for the specific purpose of applying the rules in GATT 1994 and the ATC.

29. The Council, supported by the French Government and by the Commission, relies rather on the special characteristics of the WTO agreements, which in their view provide grounds for applying to those agreements the decisions in which the Court held that the provisions of GATT 1947 do not have direct effect and cannot be relied upon.

30. They claim that the contested decision is of a special kind and is thus not comparable to the regulations at issue in Case 70/87 Fediol v Commission [1989] ECR 1781 and Case C-69/89 Nakajima All Precision v Council [1991] ECR I-2069. The decision is not a Community measure intended to 'transpose‘ certain provisions of the ATC into Community law.

31. The Portuguese Government replies that it is not GATT 1947 that is in issue in the present case but the WTO agreements, which include GATT 1994, the ATC and the Agreement on Import Licensing Procedures. The WTO agreements are significantly different from GATT 1947, in particular in so far as they radically alter the dispute settlement procedure.

32. Nor, according to the Portuguese Government, does the case raise the problem of direct effect: it concerns the circumstances in which a Member State may rely on the WTO agreements before the Court for the purpose of reviewing the legality of a Council measure.

33. The Portuguese Government maintains that such a review is justified in the case of measures such as the contested decision which approve bilateral agreements governing, in relations between the Community and non-member countries, matters to which the WTO rules apply.

34. It should be noted at the outset that in conformity with the principles of public international law Community institutions which have power to negotiate and conclude an agreement with a non-member country are free to agree with that country what effect the provisions of the agreement are to have in the internal legal order of the contracting parties. Only if that question has not been settled by the agreement does it fall to be decided by the courts having jurisdiction in the matter, and in particular by the Court of Justice within the framework of its jurisdiction under the EC Treaty, in the same manner as any question of interpretation relating to the application of the agreement in the Community (see Case 104/81 Hauptzollamt Mainz v Kupferberg [1982] ECR 3641, paragraph 17).

35. It should also be remembered that according to the general rules of international law there must be bona fide performance of every agreement. Although each contracting party is responsible for executing fully the commitments which it has undertaken it is nevertheless free to determine the legal means appropriate for attaining that end in its legal system, unless the agreement, interpreted in the light of its subject-matter and purpose, itself specifies those means (Kupferberg, paragraph 18).

36. While it is true that the WTO agreements, as the Portuguese Government observes, differ significantly from the provisions of GATT 1947, in particular by reason of the strengthening of the system of safeguards and the mechanism for resolving disputes, the system resulting from those agreements nevertheless accords considerable importance to negotiation between the parties.

37. Although the main purpose of the mechanism for resolving disputes is in principle, according to Article 3(7) of the Understanding on Rules and Procedures Governing the Settlement of Disputes (Annex 2 to the WTO), to secure the withdrawal of the measures in question if they are found to be inconsistent with the WTO rules, that understanding provides that where the immediate withdrawal of the measures is impracticable compensation may be granted on an interim basis pending the withdrawal of the inconsistent measure.

38. According to Article 22(1) of that Understanding, compensation is a temporary measure available in the event that the recommendations and rulings of the dispute settlement body provided for in Article 2(1) of that Understanding are not implemented within a reasonable period of time, and Article 22(1) shows a preference for full implementation of a recommendation to bring a measure into conformity with the WTO agreements in question.

39. However, Article 22(2) provides that if the member concerned fails to fulfil its obligation to implement the said recommendations and rulings within a reasonable period of time, it is, if so requested, and on the expiry of a reasonable period at the latest, to enter into negotiations with any party having invoked the dispute settlement procedures, with a view to finding mutually acceptable compensation.

40. Consequently, to require the judicial organs to refrain from applying the rules of domestic law which are inconsistent with the WTO agreements would have the consequence of depriving the legislative or executive organs of the contractingparties of the possibility afforded by Article 22 of that memorandum of entering into negotiated arrangements even on a temporary basis.

41. It follows that the WTO agreements, interpreted in the light of their subject-matter and purpose, do not determine the appropriate legal means of ensuring that they are applied in good faith in the legal order of the contracting parties.

42. As regards, more particularly, the application of the WTO agreements in the Community legal order, it must be noted that, according to its preamble, the agreement establishing the WTO, including the annexes, is still founded, like GATT 1947, on the principle of negotiations with a view to 'entering into reciprocal and mutually advantageous arrangements' and is thus distinguished, from the viewpoint of the Community, from the agreements concluded between the Community and non-member countries which introduce a certain asymmetry of obligations, or create special relations of integration with the Community, such as the agreement which the Court was required to interpret in Kupferberg.

43. It is common ground, moreover, that some of the contracting parties, which are among the most important commercial partners of the Community, have concluded from the subject-matter and purpose of the WTO agreements that they are not among the rules applicable by their judicial organs when reviewing the legality of their rules of domestic law.

44. Admittedly, the fact that the courts of one of the parties consider that some of the provisions of the agreement concluded by the Community are of direct application whereas the courts of the other party do not recognise such direct application is not in itself such as to constitute a lack of reciprocity in the implementation of the agreement (Kupferberg, paragraph 18).

45. However, the lack of reciprocity in that regard on the part of the Community's trading partners, in relation to the WTO agreements which are based on'reciprocal and mutually advantageous arrangements' and which must ipso facto be distinguished from agreements concluded by the Community, referred to in paragraph 42 of the present judgment, may lead to disuniform application of the WTO rules.

46. To accept that the role of ensuring that those rules comply with Community law devolves directly on the Community judicature would deprive the legislative or executive organs of the Community of the scope for manoeuvre enjoyed by their counterparts in the Community's trading partners.

47. It follows from all those considerations that, having regard to their nature and structure, the WTO agreements are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions.
48. That interpretation corresponds, moreover, to what is stated in the final recital in the preamble to Decision 94/800, according to which 'by its nature, the Agreement establishing the World Trade Organisation, including the Annexes thereto, is not susceptible to being directly invoked in Community or Member State courts'.
49. It is only where the Community intended to implement a particular obligation assumed in the context of the WTO, or where the Community measure refers expressly to the precise provisions of the WTO agreements, that it is for the Court to review the legality of the Community measure in question in the light of the WTO rules (see, as regards GATT 1947, Fediol, paragraphs 19 to 22, and Nakajima, paragraph 31).
50. It is therefore necessary to examine whether, as the Portuguese Government claims, that is so in the present case.
51. The answer must be in the negative. The contested decision is not designed to ensure the implementation in the Community legal order of a particular obligation assumed in the context of the WTO, nor does it make express reference to any specific provisions of the WTO agreements. Its purpose is merely to approve the Memoranda of Understanding negotiated by the Community with Pakistan and India.
52. It follows from all the foregoing that the claim of the Portuguese Republic that the contested decision was adopted in breach of certain rules and fundamental principles of the WTO is unfounded.
Breach of rules and fundamental principles of the Community legal order
Breach of the principle of publication of Community legislation
53. The Portuguese Government claims that this principle has been breached because the contested decision and the Memoranda of Understanding which it approves were not published in the Official Journal of the European Communities. In its reply, it merely states that the validity of its argument has been recognised, since the contested decision was published after it lodged its application.
54. In that regard, it is sufficient to observe that the belated publication of a Community measure in the Official Journal of the European Communities does not affect the validity of that measure.
**Breach of the principle of transparency**
55. The Portuguese Government contends that this principle has been breached because the contested decision approves Memoranda of Understanding which are not adequately structured and are drafted in obscure terms which prevent a normal reader from immediately grasping all their implications, in particular as regardstheir retroactive application. In support of this plea it relies on the Council Resolution of 8 June 1993 on the quality of drafting of Community legislation (OJ 1993 C 166, p. 1).
56. It should be noted that, as the Council has observed, that resolution has no binding effect and places no obligation on the institutions to follow any particular rules in drafting legislative measures.
57. Furthermore, as the Advocate General observes in point 12 of his Opinion, the decision appears to be clear in every aspect, as regards both the wording of its provisions relating to the conclusion of the two international agreements and as regards the rules contained in the two Memoranda of Understanding, which provide for a series of reciprocal undertakings by the contracting parties with a view to the gradual liberalisation of the market in textile products. Furthermore, the Portuguese Government's complaint that the contested decision fails to indicate precisely what provisions of the earlier measures it amends or repeals is not of such a kind as to vitiate that decision, since such an omission does not constitute a breach of an essential procedural requirement with which an institution must comply if the measure in question is not to be void.
58. The Portuguese Government's claim that the contested decision was adopted in breach of the principle of transparency is therefore unfounded.
Breach of the principle of cooperation in good faith in relations between the Community institutions and the Member States
59. The Portuguese Government maintains that the bilateral agreements with India and Pakistan were concluded without regard for its position concerning the negotiations with those two countries, which it had clearly stated throughout the negotiatingprocedure, in particular at the meeting of the Council on 15 December 1993 at which it was decided to accede to the WTO agreements and in a letter of 7 April 1994 from the Portuguese Minister for Foreign Affairs to the Council.
60. It consented to the signature of the Final Act of the WTO and the annexes theretoon condition that, inter alia, the obligation imposed on India and Pakistan to open up their markets could not give rise, in the negotiations with those countries, to reciprocal concessions on the part of the Member States other than those provided for in the ATC.
61. In approving the Memoranda of Understanding, which provide for an accelerated process for opening the market in textile products in comparison with the ATC and, consequently, the dismantling of the Community tariff quotas for those products, the contested decision was adopted in breach of the principle of cooperation in good faith in relations between the Community and the Member States as inferred from the wording of Article 5 of the EC Treaty (now Article 10 EC), and should therefore be annulled on that ground.
62. The Portuguese Government also claims that the signature of the Final Act required the consent of all the Member States and not of a qualified majority of the members of the Council. Any change in the equilibrium on the basis of which the Final Act was signed required fresh deliberations in the same voting conditions, that is, with unanimity.

63. The Council considers that the position expressed by the Portuguese Government, in particular in the letter of 7 April 1994 from the Minister for Foreign Affairs, is of a political nature and that, furthermore, it was taken into consideration in so far as it led to the adoption of Regulation No 852/95, whereby the Council granted a series of subsidies to the Portuguese textile industry.
64. The Council also refutes the Portuguese Government's argument that approval of the two Memoranda of Understanding should have been decided unanimously. It claims that since the contested decision constitutes a commercial policy measure it could be adopted by a qualified majority of the members of the Council on the basis of Article 113(4) of the EC Treaty (now, after amendment, Article 133(4) EC). The adoption of both memoranda complied fully with the provisions of the Treaty, moreover, in particular Article 113.
65. The Commission supports the Council's argument and further contends that, even if the Portuguese Republic expressed reservations in concluding the final agreement, the Council's failure to act in accordance with that agreement could not constitute a ground for annulling the contested decision.
66. The Court observes, first, that the contested decision is a measure of commercial policy, to be adopted by a qualified majority pursuant to Article 133(4) of the Treaty. Accordingly, since it is common ground that the contested decision was adopted in accordance with that provision, the fact that a minority of Member States, including the Portuguese Republic, were opposed to its adoption is not of such a kind as to vitiate that decision and entail its annulment.
67. Second, the Court observes, as did the Advocate General at point 32 of his Opinion, that the principle of cooperation in good faith between the Community institutions and the Member States has no effect on the choice of the legal basis of Community legal measures and, consequently, on the legislative procedure to be followed when adopting them.
68. Accordingly, the Portuguese Republic's claim that the contested decision failed to comply with that principle is unfounded.

**Breach of the principle of legitimate expectations**

69. The Portuguese Government claims that in adopting the contested decision the Council breached the principle of legitimate expectations as regards economic operators in the Portuguese textile industry.
70. It maintains that the latter were entitled to expect that the Council would not substantially alter the timetable and rate of the opening of the Community market in textile products to international competition, as fixed in the WTO agreements, in particular the ATC, and in the applicable Community legislation, in particular Regulation No 3030/93, as amended by Regulation No 3289/94, which transposed the rules set out in the ATC into Community law.
71. The adoption of the contested decision entailed a significant acceleration of the process of liberalising the Community market and therefore altered the legislative framework established by the ATC by making it significantly tougher. That significant and unforeseeable alteration of the conditions of competition in the Community market in textile products changed the framework in which the Portuguese economic operators implemented the restructuring measures which the Council itself, in adopting Regulation No 852/95, deemed indispensable, rendering those measures less effective and causing serious harm to the operators concerned.
72. The Council contends, first, that Portuguese operators in the textiles sector could not rely on a legitimate expectation that a situation which was still the subject of negotiation would be maintained. Although they assumed that the markets in India and Pakistan would be opened up without any reciprocal concessions, that expectation was not such as to found a legitimate expectation, having regard to the fact that it did not result from any legal commitment given by the Council.
73. Second, the Council contends that the approval of the two Memoranda of Understanding does not call in question the outcome of the Uruguay Round. Thememoranda do not contain any provision modifying the level of restrictions in force or the rate of expansion provided for in the bilateral agreements concluded with India and Pakistan. The Memoranda of Understanding provide only that the Commission is prepared to give favourable consideration to requests for exceptional flexibilities (including carry-over, carry-forward and inter-category transfers) introduced by Pakistan or India, within the framework of the existing restrictions and not exceeding, for each quota year, the amounts fixed in each memorandum. Those exceptional flexibilities, and in particular the possibility of carrying them forward, do not modify the restrictions in force and, in particular, do not have the effect of altering the timetable for integration of the categories concerned into GATT 1994.
74. The Commission maintains that the Portuguese Republic cannot reply on breach of the principle of legitimate expectations of the economic operators because, first, it does not have a direct and personal interest in the protection of their legitimate interests and, second, it failed to forewarn those economic operators, although the information in its possession showed clearly and adequately that in order to reach an agreement the Community would probably have to grant additional concessions.
75. In that regard, it should be noted that it is settled law that the principle of respect for legitimate expectations cannot be used to make a regulation unalterable, in particular in sectors - such as that of textile imports - where continuous adjustment of the rules to changes in the economic situation is necessary and therefore reasonably foreseeable (see to that effect Case C-315/96 Lopex Export [1998] ECR I-317, paragraphs 28 to 30).
76. Furthermore, for the reasons stated by the Advocate General at point 33 of his Opinion, no appreciable differences in treatment were established between Indian and Pakistani producers, on the one hand, and those from other States which haveacceded to the

WTO, on the other hand; in any event, if such differences exist they are not of such a kind as to prejudice the expectations of the operators concerned.

77. It follows that the Portuguese Republic's claim that the contested decision was adopted in breach of the principle of legitimate expectations is unfounded.

**Breach of the principle of the non-retroactivity of legal rules**

78. The Portuguese Government claims that the principle of the non-retroactivity of legal rules has been breached, since the arrangements introduced by the Memoranda of Understanding approved in the contested decision have retroactive effect and apply to past situations without any reasons being stated for the need to derogate from the principle that legal rules apply only for the future.

79. Although they were signed on 15 October and 31 December 1994 respectively, and only approved by the Council on 26 February 1996, the Memoranda of Understanding concluded with Pakistan and India ratify the application of a system of exceptional flexibilities which took effect, pursuant to paragraph 6 of each memorandum, as from 1994 in the case of Pakistan and 1995 in the case of India.

80. In that regard, it is sufficient to point out that the implementation of these international commitments in Community law was to be effected by the Commission, pursuant to Article 19 of Regulation No 3030/93, by the adoption of measures amending the annexes thereto.

81. Accordingly, it is only in the context of an action against the adoption of such measures that their retroactive effect may be challenged.

82. It follows that the Portuguese Republic cannot rely on the claim that the contested decision failed to observe the principle of the non-retroactivity of legal measures.

**Breach of the principle of economic and social cohesion**

83. The Portuguese Government maintains that the contested decision was adopted in breach of the principle of economic and social cohesion set out in Articles 2 and 3(j) of the EC Treaty (now, after amendment, Articles 2 EC and 3(1)(k) EC), and also of Articles 130a of the EC Treaty (now, after amendment, Article 158 EC), 130b and 130c of the EC Treaty (now Articles 159 EC and 160 EC), and 130d and 130e of the EC Treaty (now, after amendment, Articles 161 EC and 162 EC). The Council itself referred to such a principle in the recitals in the preamble to Regulation No 852/95, when it stated that the adoption of that regulation had become necessary owing to the adoption of legal arrangements which aggravated inequalities and jeopardised the economic and social cohesion of the Community.

84. The Council maintains that the Community adopted Regulation No 852/95 in favour of the Portuguese industry in order to strengthen economic and social cohesion. It also observes that the Community's obligation to integrate textile products and clothing within the framework of GATT 1994 in accordance with the provisions of the ATC and Regulation No 3289/94 amending Regulation No 3030/93, was not affected by the commitments contained in the two Memoranda of Understanding.

85. The Commission maintains that, contrary to what the Portuguese Republic claims, the EC Treaty does not set up economic and social cohesion as a fundamental principle of the Community legal order, compliance with which is absolutely binding on the institutions to the extent that any measure capable of having a negative impact on certain less-favoured areas of the Community is automatically void.

86. The Court would observe that although it follows from Articles 2 and 3 of the Treaty, and also from Articles 130a and 130e, that the strengthening of economicand social cohesion is one of the objectives of the Community and, consequently, constitutes an important factor, in particular for the interpretation of Community law in the economic and social sphere, the provisions in question merely lay down a programme, so that the implementation of the objective of economic and social cohesion must be the result of the policies and actions of the Community and also of the Member States.

87. Consequently, the Portuguese Government's claim that the contested decision was adopted in breach of the principle of economic and social cohesion is unfounded.

**Breach of the principle of equality between economic operators**

88. The Portuguese Government claims that the contested decision favours woollen products over cotton products, since the measures opening the markets of India and Pakistan established by the Memoranda of Understanding benefit virtually exclusively Community producers of wool products. Producers in the cotton sector - in which the essential part of the export capacity of the Portuguese industry is concentrated - are thus doubly penalised.

89. The Council replies that the purpose of the negotiations with India and Pakistan was to improve access to the Indian and Pakistan markets. If the products supplied by those two countries tended to suit a particular category of economic operator, in this case those in the wool sector, that cannot constitute a breach of the principle of equality between economic operators, since the memoranda were not in any way intended to discriminate between them.

90. The Commission maintains that the fact that India and Pakistan offered more favourable treatment for wool products than for cotton products (an allegation which has not been proven by the Portuguese Republic) and thereby established a certain inequality of treatment between different categories of operators in thetextile industry cannot be attributed to the Council as discrimination on its part. Even if it could, the discrimination would be justified by the nature of the measure in question and the objective which the Council pursued in approving the Memoranda of Understanding, namely to improve, in the common in-

terest, access to the Indian and Pakistan markets for all products of Community origin.
91. The principle of non-discrimination requires that 'comparable situations should not be treated in a different manner unless the difference in treatment is objectively justified‘ (see, in particular, Germany v Commission, cited above, paragraph 67).
92. In the present case, as the Advocate General observes at point 35 of his Opinion, operators in the textile sector are active in two separate markets, the market in wool and the market in cotton, and, consequently, any economic prejudice suffered by one of those two categories of producers does not imply a breach of the principle of non-discrimination.
93. Consequently, the Portuguese Republic's claim that the contested decision was adopted in breach of the principle of equality between economic operators is also unfounded.
94. It follows that its claim that the contested decision was adopted in breach of certain rules and fundamental principles of the Community legal order is unfounded; accordingly, the application must be dismissed in its entirety.
**Costs**
95. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs, if they have been applied for in the successful party's pleadings. Since the Council applied for the Portuguese Republic to be orderedto pay the costs and the Portuguese Republic has been unsuccessful, it must be ordered to pay the costs. Under Article 69(4) of the Rules of Procedure, the Member States and institutions which have intervened in the proceedings are to bear their own costs.
On those grounds,
THE COURT
hereby:
1. Dismisses the application;
2. Orders the Portuguese Republic to pay the costs;
3. Orders the French Republic and the Commission of the European Communities to bear their own costs.

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**OPINION OF ADVOCATE GENERAL SAGGIO**

delivered on 25 February 1999 (1)
Case C-149/96
Portuguese Republic
v
Council of the European Union
(Commercial policy - Importation of textile products - Products originating in the Republic of India - Bilateral agreement concluded with the Republic of India - Conflict with World Trade Organisation rules)
1. By its application for annulment under Article 173 of the EC Treaty, lodged at the Court Registry on 3 March 1996, the Portuguese Republic asks the Court to annul Council Decision 96/386/EC of 26 February 1996 concerning the conclusion of Memoranda of Understanding between the European Community and the Islamic Republic of Pakistan and between the European Community and the Republic of India on arrangements in the area of market access for textile products (2) (hereinafter 'the decision‘).
**Legal background**
**International multilateral agreements**
2. The first general regulatory framework for the textiles sector was provided by the multilateral arrangement of 20 December 1973 regarding International Trade in Textiles, commonly referred to as 'the Multifibre Arrangement‘. (3) This arrangement entered into force on 1 January 1974 and, due to a series of extensions, (4) remained in force until 31 December 1994. The basic objectives of the Multifibre Arrangement were 'to achieve the expansion of trade, the reduction of barriers to such trade and the progressive liberalisation of world trade in such products, while at the same time ensuring the orderly and equitable development of this trade and avoidance of disruptive effects in individual markets and on individual lines of production in both importing and exporting countries‘ (Article 1(2)). Accordingly, the arrangement provides that 'participating countries may, consistently with the basic objectives and principles of this arrangement, conclude bilateral agreements on mutually acceptable terms in order, on the one hand, to eliminate real risks of market disruption ... in importing countries and disruption to the textile trade of exporting countries, and on the other hand to ensure the expansion and orderly development of trade in textiles and the equitable treatment of participating countries‘ (Article 4(2)).
3. Following the Declaration adopted at Punta del Este on 20 September 1986, international negotiations were opened with the aim of integrating the textiles and clothing sector into the GATT, which in turn would mean applying the GATT rules and disciplines to the sector and would therefore constitute a move towards opening up national markets.
On 15 April 1994, the Final Act concluding the multilateral trade agreements of the Uruguay Round was signed in Marrakesh, together with the Agreement establishing the World Trade Organisation and a series of multilateral trade agreements attached to the WTO Agreement, including the Agreement on Textiles and Clothing (hereinafter referred to as 'the ATC‘). The Community acceded to the agreement by Council Decision 94/800/EC concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-94). (5)
4. The ATC contains the rules on the international trade in textiles for a transitional period of 10 years culminating in the definitive integration of the sector into the GATT (Article 1 of the ATC). Under Article 2(1) of the ATC, all quantitative restrictions introduced under bilateral agreements are to be notified, within 60 days following entry into force of the ATC, to the Textiles Monitoring Body established under the ATC. (6) On the date of entry into force of the WTO Agreement, each Member is to integrate into the GATT products which accounted for not less than 16 per cent of the total volume of the Member's 1990 imports (Article

2(6)). The remaining products are to be integrated in three stages: on the first day of the 37th month, the first day of the 85th month and the first day of the 121st month respectively that the WTO Agreement is in effect. By the end of the third phase, 'the textiles and clothing sector shall stand integrated into GATT 1994, all restrictions under this agreement having been eliminated'. [Article 2(8), in particular (c)]. Finally, with regard to various systems providing flexibility, Article 2(16) of the ATC provides that '[f]lexibility provisions, i.e. swing, carryover and carry forward, applicable to all restrictions maintained pursuant to this article, shall be the same as those provided for in MFA bilateral agreements for the 12-month period prior to the entry into force of the WTO Agreement'. (7) Furthermore, '[n]o quantitative limits shall be placed or maintained on the combined use of swing, carryover and carry forward'.

**International agreements concluded between the European Community and the Islamic Republic of Pakistan and between the European Community and the Republic of India**

5. On 15 October and 31 December 1994 the Commission initialled two Memoranda of Understanding with Pakistan and India respectively 'on arrangements in the area of market access for textile products'.

The Memorandum of Understanding with Pakistan provides for a number of commitments on the part of both the Community and Pakistan. In particular, Pakistan is to remove all quantitative restrictions on the textile products given in Annex II to the Memorandum of Understanding. The Commission is to ensure that 'all restrictions currently affecting the importation of products of the handloom and cottage industries of Pakistan are removed before entry into force of the WTO' (paragraph 7) and 'to give favourable consideration to requests which the Government of Pakistan might introduce in respect of the management of existing [tariff] quota restrictions' (paragraph 6).

The Memorandum of Understanding with India provides that the Indian Government will bind its tariffs on the textiles and clothing items listed in the Attachment to the Memorandum of Understanding and that 'these rates will be notified to the WTO Secretariat within 60 days of the date of entry into force of the WTO'. It also provides that the Indian Government may 'introduce alternative specific duties for particular products' and that these duties 'will be indicated as a percentage ad valorem or an amount in INR per item/square metre/kg, whichever is higher' (paragraph 2). The European Community agreed to 'remove with effect from 1 January 1995 all restrictions currently applicable to India's exports of handloom products and cottage industry products as referred to in Article 5 of the EC-India agreement on trade in textile products' (paragraph 5). (8) The Commission undertook to give favourable consideration to requests 'which the Government of India might introduce for exceptional flexibilities, in addition to the flexibilities applicable under the bilateral textiles agreement' up to the amounts indicated in the Memorandum of Understanding (paragraph 6).

6. On a proposal from the Commission dated 7 December 1995, the Council adopted the contested Decision on the conclusion of these understandings on 26 February 1996. The Decision was approved by a qualified majority; Spain, Greece and Portugal voted against it.

7. The understandings with India and Pakistan were signed respectively on 8 and 27 March 1996.

8. The above Council Decision of 26 February 1996 was published in the Official Journal of the European Communities on 27 June 1996.

Community legislation on import quotas for textile products

9. Council Regulation (EEC) No 3030/93 of 12 October 1993 on common rules for imports of certain textile products from third countries (hereinafter referred to as 'Regulation 3030/93'), (9) lays down quantitative limits on Community imports of textiles from third countries. Under Article 1(1), as amended by Council Regulation 3289/94 of 22 December 1994, (10) the regulation applies to:

'- imports of textile products listed in Annex I, originating in third countries with which the Community has concluded bilateral agreements, protocols or other arrangements as listed in Annex II, - imports of textile products which have not been integrated into the World Trade Organisation within the meaning of Article 2(6) of the World Trade Organisation Agreement on Textiles and Clothing (ATC) as listed in Annex X and which originate in third countries, Members of the WTO as listed in Annex XI'.

**Substance**

**Breach of general principles of the Community legal order**

10. The Portuguese Government contests the lawfulness of the Council Decision on the ground that it contravenes both the general principles of Community Law and the rules of the WTO. With regard to the first claim, the Portuguese Government invokes a number of grounds for annulment: (a) breach of the principle of publication of Community legislation, (b) breach of the principle of transparency, (c) breach of the principle of cooperation in good faith between the Community and the Member States, (d) breach of the principle of protection oflegitimate expectations, (e) breach of the principle of the non-retroactivity of legal rules, (f) breach of the principle of economic and social cohesion and (g) breach of the principle of equality between economic operators.

Three of these grounds can be seen as distinct from the arguments put forward in support of claims of a conflict between the decision and WTO rules, and may therefore be considered here. They are: the plea concerning a breach of the principle of publication [(a)], breach of the principle of transparency [(b)] and breach of the principle of non-retroactivity of legal rules [(e)]. I shall deal later with the four other grounds relied on, after considering the compatibility of the rules contained in the bilateral agreements with those in the multilateral WTO Agreement and its annexes.

11. In considering the claim of breach of the principle of 'publication of Community legislation', I shall merely point out that under Article 254 EC (ex Article 191), which deals with the publication of Community acts, there is no requirement to publish decisions on the conclusion of international agreements. However, according to established practice, Council acts on the conclusion of international agreements are published in the Official Journal of the European Communities. On a point of fact, I should however point out that the contested Decision, which dates from February 1996, was published in June of the same year, thus about four months after its adoption. A delay of this kind, in my opinion, does not justify annulment of the decision.

12. In support of its second plea, concerning breach of the principle of transparency, the Portuguese Government invokes the Council Resolution of 8 June 1993 on the quality of drafting of Community legislation. (11) As the Council has observed, the resolution has no binding effect (12) and therefore places no obligation on the institutions to follow any particular rules in drafting legislative measures, although it does constitute a political commitment that such legislation should be made clear and comprehensible to those to whom the law applies, and on a more general level, to all interested parties. In point of fact, however, the decision appears to be clear in every aspect, as regards both the wording of its provisions relating to the conclusion of two international agreements and as regards the rules contained in the two Memoranda of Understanding, which provide for a series of reciprocal undertakings by the contracting parties with a view to the gradual liberalisation of the market in textile products. The Portuguese Government's complaint that the decision fails to indicate precisely what provisions of the earlier measures it amends or repeals does not mean that the decision itself is void, nordoes such an omission constitute a breach of any rule of law which could justify its annulment. This plea too, in my opinion, is therefore unfounded.

13. Nor is it possible to base a claim that the contested decision is unlawful on a breach of the principle of non-retroactivity of Community legal rules. It is true that the decision, adopted in February 1996 concerns the conclusion of two agreements in which the Community made certain commitments - on the gradual opening up of the internal market - beginning in 1994 in the case of Pakistan, and in 1995 in that of India; I do not, however, consider that making such commitments constitutes a breach of the principle of non-retroactivity invoked by the Portuguese Government.

On this matter, the Council observes that the Memoranda of Understanding were initialled in 1994 and that it is to be expected that they should contain provisions concerning the importation of textiles as from 1995. In any case, according to the Council, as the contested decision sets the date of signing by the contracting parties (8 and 27 March 1996) as the date on which the agreements were to come into force, it does not provide for those agreements to be applied retroactively. As I see it, the Council is confusing entry into force with provisional application. There is no clause in the decision which provides specifically for its entry into force and, having been published in the Official Journal of the European Communities, it therefore came into force, according to the general rules, on the twentieth day following publication (Article 254 EC (ex Article 191)). Furthermore, the decision does not expressly provide for retroactive application of its provisions. However, the absence of such a provision does not imply in this instance that the decision is not binding on the Community with regard to the period before the conclusion of the agreements, as these expressly contain a series of commitments by the Community and the other contracting States, to be fulfilled from 1994/95. Therefore, contrary to what the Council claims, it is not necessary to establish the actual date of entry into force of the measure on the basis of the general rules on international agreements, and in particular Article 24 of the Vienna Convention on the Law of Treaties of 22 May 1969 which deals with the entry into force of international agreements, but rather to determine, in the light of general principles of Community Law, whether the provisions of the agreements at issue can be regarded as applicable from 1994/95.

The general principle of non-retroactivity of Community acts has been interpreted, in well-known, settled case-law, as meaning that a measure may, exceptionally, have retroactive effect, but only where its aims justify retroactive application and where such application does not breach the legitimate expectations of those concerned. In this case, it is clear that retroactive application of the agreements is justified by the fact that the Community made an express commitment, to other Contracting States, to provide for the gradual liberalisation of access for textile products from these States from 1994/95 and that therefore any delay in concluding the agreements and initiating the process of opening up the Community market wouldconstitute an amendment to the text of the agreement (unless the system provided by the agreements could in fact affect the trade in goods imported before the entry into force of the agreements). On the matter of a possible breach of the legitimate expectations of those concerned, I do not believe that specific expectations of operators in this sector can be identified as regards binding import quotas, given that the liberalisation of the textiles market was the subject of long negotiations in the course of the Uruguay Round and, furthermore, that at the beginning of 1995, the Commission, precisely for the purpose of applying the Memorandum of Understanding concluded with India at the end of 1994, repealed Regulation No 3030/93 on imports of certain textile products into the Community by Regulation (EC) No 3053/95, (13) in respect of the part in which it provided for the establishment of quantitative limits for cottage industry textile products from India. On the basis of these observations, I therefore consider that this plea also should be held to be unfounded.

**Breach of the rules of the WTO Agreements**

- Admissibility of pleas concerning breach of the rules of the WTO Agreements

(a) General considerations: case-law on the direct effect of GATT rules

14. In support of its view that it is entitled to rely on World Trade Organisation rules, the Portuguese Government states that, as the contested decision, under which the bilateral agreements with India and Pakistan on the importation of textile products were concluded, constitutes an act enforcing GATT provisions, those provisions, even though they do not have direct effect, may be relied upon in the present case, in accordance with the frequently cited judgment in Germany v Council. (14) The Council contends that the contested decision is not an act enforcing WTO rules; it argues that the Portuguese Government is, in fact, inferring a conflict between the bilateral agreement concluded between the Community and India, and the multilateral agreement on textiles - the ATC - (attached to the Agreement establishing the World Trade Organisation) on the other, a matter which comes under the exclusive jurisdiction of the Textiles Monitoring Body provided for in the multilateral agreement. The Commission, for its part, merely points out that the rules of the World Trade Organisation cannot constitute a criterion of legality since they do not have direct effect, that being theexplicit intention of the Council which, in the act concluding the WTO Agreements and in its decision of 22 December 1994, expressly ruled out the possibility of invoking provisions of the Agreement or its Annexes 'in Community or Member State courts‘ (eleventh recital in the preamble to Decision 94/800).

n order to decide on the admissibility of the pleas of illegality advanced by the Portuguese Government, it is necessary to determine the effect of international agreements on the Community legal order, in particular with reference to the case-law on the General Agreement on Tariffs and Trade.

15. Article 228(7) of the Treaty establishes that agreements concluded under the conditions set out in that article between the Community and one or more States or an international organisation 'shall be binding on the institutions of the Community and on Member States‘. International agreements therefore constitute sources of law with which the institutions must comply. As the Court ruled in its judgment in Haegeman in 1974, they constitute, 'as far as concerns the Community, an act of one of the institutions of the Community within the meaning of subparagraph (b) of the first paragraph of Article 177. The provisions of the agreement, from the coming into force thereof, form an integral part of Community law‘. (15) When the institutions adopt acts of secondary legislation, they must therefore comply with the rules contained in agreements, from the time when the international agreements are concluded. Any conflict between a Community source and a source contained in an agreement generally constitutes a defect in the Community measure which justifies its annulment.

The Court, in exercising its function as the organ which ensures compliance with Community law and consequently with all legal sources which produce effects within the Community legal order, including international agreements concluded by the Community, has recognised that it has jurisdiction to give preliminary rulings on the interpretation of such agreements with the aim of 'ensuring their uniform application throughout the Community‘. (16) In numerous judgments on the interpretation of international agreements, the Court has held that, to determine whether a provision in an international agreement has direct effect within the legal order of the Member States, it is necessary first to ascertain whether the contentof that provision is clear, precise and unconditional, and then to evaluate the content in the light of the aims and context of the agreement. (17)

16. As regards the rules contained in the GATT or in agreements concluded within the framework of the GATT, the Community judicature has held that it has in principle no jurisdiction either to interpret GATT rules or to determine the legality of Community acts conflicting with such rules, and has therefore not admitted these international rules as a criterion of the legality of Community acts.

Let me retrace the steps that led the Court to that conclusion. In International Fruit (1972), (18) the validity of three regulations on the common organisation of the markets in the fruit and vegetable sector was questioned; it was claimed that they were contrary to Article XI of the GATT. The Court confirmed that it has jurisdiction to give preliminary rulings concerning the validity of acts of the institutions of the Community, even if the ground on which their validity is contested is that they are contrary to a rule of international law, but held that, 'before the incompatibility of a Community measure with a provision of international law can affect the validity of that measure, the Community must first of all be bound by that provision‘. Thus the Court, while confirming its own jurisdiction to examine 'whether their validity may be affected by reason of the fact that they are contrary to a rule of international law‘, nevertheless made the exercise of that jurisdiction subject to the condition that it should be possible to invoke GATT rules before a national court. In fact, the Court ruled that 'before invalidity can be relied upon before a national court, that provision of international law must also be capable of conferring rights on citizens of the Community which they can invoke before the courts‘ (paragraphs 4 to 9).

The Court then considered whether the GATT 'confers rights on citizens of the Community on which they can rely before the courts in contesting the validity of a Community measure‘. For this purpose, the judge continued, 'the spirit, the general scheme and the terms of the GATT must be considered‘ (paragraphs 19 and 20). In its analysis of the characteristics of the GATT, the Court concluded that the provisions of that agreement may not be invoked before national courts, essentially for two reasons: first, the great flexibility of its provisions, in particular those conferring the possibility of derogations and the option for States to adopt unilateral measures when confronted with exceptional difficulties; and second, the inadequacy of the arrangements for the settlement of conflicts between the contracting

parties. The Court therefore concluded that, although under the ECTreaty the Community had assumed powers previously exercised by Member States in implementing the GATT and although the provisions of that agreement are to be regarded as binding within the Community legal order, nevertheless the General Agreement cannot be invoked by an individual before a national court and, therefore, the Court may not give a ruling on incompatibility between a Community measure and GATT rules in the context of a question on validity raised under Article 177. (19) Later, in its judgments in SIOT, SAMI and Chiquita (20) the Court, following the same reasoning, also held that it did not have jurisdiction to interpret the GATT rules in the context of references for a preliminary ruling under Article 177 of the Treaty.

17. In the judgment of 5 October 1994 in Germany v Council, relied on by the parties in the present case, the limited jurisdiction of the Community judicature was held to apply also to an action brought under Article 173 of the Treaty. The judgment repeated that the great flexibility of the GATT provisions and the loose arrangements for the settlement of conflicts not only mean that 'an individual within the Community cannot invoke it in a court to challenge the lawfulness of a Community act, [but] also preclude the Court from taking provisions of GATT into consideration to assess the lawfulness of a [Community act] in an action brought by a Member State under the first paragraph of Article 173 of the Treaty' (paragraph 109). In other words, as the GATT does not have direct effect, national courts may not apply the rules of the agreement or refer questions for preliminary ruling on any conflict between the two sources of law, nor may the Court give a ruling on the lawfulness of a Community act which is claimed to be contrary to a GATT rule in an action for annulment. The Court added that 'the special features [of the GATT] show that the GATT rules are not unconditional', although their content may be, and that 'an obligation to recognise them as rules of international law which are directly applicable in the domestic legal systems of the Contracting Parties cannot be based on the spirit, general scheme or terms of GATT'. The Court concludes from this that in the absence of such an obligation, it is not required to review the lawfulness of a Community act that is alleged to conflict with the GATT rules. In the same judgment, Germany v Council, the Court, citing two previous judgments (21) held that it had jurisdiction to review thelawfulness of such an act only 'if the Community intended to implement a particular obligation entered into within the framework of GATT, or if the Community act expressly refers to specific provisions of GATT' (paragraph 111). The Court, therefore, citing judgments which apparently are not entirely in line with the settled case-law which denies that the GATT rules have direct effect and may therefore be enforced by the Community judicature, held that these provisions produce binding effects within the Community legal order only if the contested act implements the GATT, that is, if there is a functional relationship between the GATT rules and the Community rules, and also if the Community act refers expressly to the international rules.

18. The case-law cited above is surprising: the Court has held that for the GATT and the agreements concluded on the basis of the General Agreement to be considered as a source of law and therefore as a criterion for determining the legality of Community acts within the Community order, individuals must be able to invoke its provisions before a court of law. That condition was set out for the first time in a preliminary ruling on validity and therefore in the context of proceedings before a national court. In its judgment in International Fruit the Court concluded that the GATT rules were not applicable because they could notbe invoked before a national court and that the national court consequently could not refer a question for a preliminary ruling on the validity of a Community measure by reference to the rules of the agreement in question. On this I shall simply point out that, in principle, the right to review the legality of a Community act does not depend on whether the rules invoked as a criterion for determining the legality of that act have direct effect, in cases where it is claimed that the Community act infringes rules of international law other than the GATT. (22) What is even more surprising is the conclusion that privileged persons, such as Member States, may not invoke the provisions of the GATT as a criterion of legality in direct actions brought under Article 173 of the Treaty. It is not clear why the functioning of an international agreement, as a criterion of legality for Community acts, should be subject to the conditions normally required, in a specifically Community context, for the direct effect of the provisions of international agreements concluded by the Community to be recognised. In my view, an international agreement, by virtue of its clear, precise and unconditional terms, can in principle constitute a criterion of legality for Community acts. This does not mean - in the light of Community law on the subject - that a rule displaying those characteristics necessarily confers on individuals rights on which they may rely in actions before the courts. For this result to be achieved in the Community legal order, this is, for individuals to be entitled to rely on a provision in an agreement before the courts, it must be implicit in the general context of the agreement that its provisions may be invoked before the courts. That being so, I believe that a provision of an agreement may be held not to have direct effect but that does not justify failing to recognise it as binding on the Community institutions and thence excluding it as a criterion of legality (for the Community).

Furthermore, to restrict the Court's jurisdiction to interpreting and applying WTO rules only where Community measures enforce the rules or expressly refer to them would mean that the rules of the WTO Agreement could not be applied unless the international agreement had been incorporated in the Community legal order by means of a transposing or enabling act, and would thus reduce the scope of Article 228(7) of the Treaty which, according to the Court's interpreta-

tion, provides for international agreements to be binding within the Community legal order from the time they are concluded.

(b) Direct applicability of WTO provisions and the scope of the eleventh recital in the preamble to Council Decision 94/800

19. On the basis of the above considerations, let us now consider the effectiveness and, thence, the possibility of direct applicability - as discussed above - of the WTO provisions. In academic writings it has rightly been stressed that the rules of the World Trade Organisation differ in nature from those of its predecessor, the GATT, an essentially provisional agreement providing for a flexible system of powers of the Member States which limited the extent to which individual provisions could be binding and, on the same principle, did not (as the Court has stressed) establish a clearly defined, fixed system for the settlement of disputes. While it must be recognised, on the basis of my earlier observations, that such characteristics do not, in principle, preclude the possibility that a particular provision in an international agreement may have specific legally binding effects on persons in international law - and therefore on their institutions - which have ratified the agreement or which (as in the case of the Community in the context of the GATT Agreement of 1947) are bound indirectly by them, the process of amendment of the agreements on the liberalisation of international trade must also be considered, a process which led to the creation of an international body of an institutional nature such as the World Trade Organisation, with a more balanced and stable structure than that of the organisation established under the 1947 agreement. Above all, it must be recognised that many provisions of the agreements attached to the Agreement establishing the WTO give rise to obligations and prohibitions that are unconditional and include specific undertakings for commitments by the contracting parties in the context of their reciprocal relations.

Much has been written about the reform of the system for the settlement of disputes and it has rightly been held that the present system gives little latitude to States who believe they are victims of illegal conduct on the part of another contracting party. The general system (23) provides for the establishment of a General Council which is responsible, amongst other things, for dispute settlement (Article IV(3), WTO Agreement). The Dispute Settlement Body appoints a panel which adjudicates completely autonomously on any possible breach of the rules in the WTO Agreements (Article 6(1) of the Understanding on Rules and Procedures governing the Settlement of Disputes). The panel's report is adopted by theMembers of the Body by a majority vote of members present. Unanimity is required only where the report is not adopted, with the result that any veto by the State accused of breaching a WTO provision is not sufficient to prevent adoption of that report (Article 16(4) of the Understanding on the Settlement of Disputes, cited above). (24)

20. In the decision on the conclusion of the WTO Agreement, the Council stated in the last recital in the preamble to Decision 94/800 that by its nature, the Agreement establishing the World Trade Organisation, including the annexes thereto, is not susceptible to being directly invoked in Community or Member State courts. It seems that the Council intended thus to limit the effects of the agreement and to align itself with the approach of the other contracting parties who made it quite clear that they wished to limit the possibility of relying on provisions of that agreement before national courts.

Although the wording of the recital is clear, there remain doubts as to the effects that a declaration of this kind might produce at international level, in relations with third countries, and at Community level. It need hardly be stated that a unilateral interpretation of the agreement made in the context of an internal adoption procedure cannot - outside the system of reservations - limit the effects of the agreement itself. This interpretation, which favours the objective content of provisions of the agreement over wishes expressed in separate unilateral declarations is in accordance with customary law on the interpretation of treaties,embodied in the Vienna Convention of 22 May 1969, in particular in Articles 31 to 33. (25) According to this case-law, 'Embodying customary international law, Article 31 provides that a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose. The text of the treaty is the primary source for interpretation, while external aids such as travaux préparatoires, constitute a supplementary source‘. (26)

In respect of the scope of that declaration in the context of the Community legal order, it is sufficient here to point out that the WTO Agreements, by virtue of their status as international agreements, are binding on all the institutions (under Article 228(7) of the Treaty, cited several times above) and therefore constitute a source of Community law. The Court of Justice therefore has an obligation to ensure that the agreements are respected both by the Community institutions and by the Member States, and, furthermore, the Council may not, by an act of secondary legislation, limit the Court's jurisdiction, nor decide to rule out the jurisdiction of national courts to apply these agreements. (27)

In the light of these considerations, I maintain that, contrary to what the Commission has stated, the declaration contained in the eleventh recital in the preamble to the decision is simply a policy statement and, as such, cannot affect the jurisdiction of either Community or national courts to interpret and apply the rules in the WTO Agreements.

21. Similarly, any statements by other States which have acceded to the WTO Agreements and which reject the direct effect of the provisions of the agreements cannot be considered relevant. Statements of this kind do not affect the scope of those provisions or the question whether they are binding within the Community legal order. In other words, I would find it difficult to admit that such statements can in themselves limit the binding nature of the whole system of WTO agree-

ments with respect to all other contracting states. A strong argument for the proposition that the WTO rules are not binding because of the reciprocal nature of obligations undertaken in an international context, might be failure by a contracting state to comply with one or more provisions of the agreement combined with the fact that there are no adequate instruments for imposing sanctions for any breach or failure to comply by the authorities of the State concerned. It should be remembered here that, on the basis of the rule of international customary law, inadimplenti non est adimplendum, the breach of a provision of an agreement by a third country, if it is a material breach, may justify the agreement being suspended or even extinguished,either for all contracting States or only for the State in breach (Article 60 of the Vienna Convention on the Law of Treaties). (28) A breach of this kind could therefore justify a suspension of the WTO Agreement and preclude application of the provisions of the agreement by the judiciary. (29)

22. It is worth adding that a breach on the part of a contracting party is not the only reason for the WTO Agreement to be suspended and therefore not to be applied by the judicature. The WTO Agreement, like the other international agreements attached to it, does not preclude the option of recourse to all the grounds for termination or suspension of the Agreement provided for by customary law and listed in the Vienna Convention in Articles 54 to 64 (for example, the rebus sic stantibus rule).

here is also a strong case for holding that the rules of the agreement are not applicable or a fortiori binding even if the agreement was not suspended orextinguished, whenever the fulfilment of an obligation under the WTO entails a risk for the Community of jeopardising the balanced operation of the Community legal order and the pursuit of its objectives. In other words, whenever implementating the WTO Agreements entails failing to comply with rules of Community primary law or general principles which have assumed the nature of constitutional rules in the Community legal order, the Court may, in my opinion, hold the obligation assumed in the context of the agreement to be unlawful and may refrain from applying the rule of the agreement in the particular instance. Even if this may cause the Community to be held to be in breach of international law, the Court, which has the duty to ensure respect of the independence of the Community legal order, may not apply provisions that require the institutions to act in a manner that is inconsistent with the proper functioning and the objectives of the Treaty.

23. In its defence, the Council states that the WTO Agreements provide for an autonomous system for the settlement of disputes which usurps the Court's powers to interpret and apply the rules of the agreements. In my opinion, the system provided for in the WTO Agreements, and in particular in the Understanding on the Settlement of Disputes, does not imply any limitation on the jurisdiction of the Court of Justice because, first, it does not provide for the establishment of a judicial body but for a system for the settlement of disputes between persons subject to international law: the body which adopts the decisions or recommendations is a political body to which individuals within a particular domestic legal order have no access; and, second, the establishment of a judicial body whose jurisdiction was not limited to interpreting and applying the agreement but also included the power to annul measures of the Community institutions would be incompatible with the Community legal order inasmuch as it would clearly conflict with Article 164 of the EC Treaty. (30) In any case, it is evident that internalreview of the rules of agreements by the Community institutions and the Member States cannot fail to offer a stronger guarantee of the fulfilment of the obligations undertaken at international level and is therefore in keeping with the objectives of the agreement. The fact that the contracting parties have undertaken to use the dispute settlement system provided by the WTO Agreements to settle disputes arising from breaches of the agreement and the possible adoption of retaliation measures, does not preclude the parties themselves from annulling or sanctioning internal measures which might be contrary to the rules of the agreement.

24. For the reasons given above, I believe that, in the present case where a Member State has brought a direct action under Article 173 of the Treaty challenging an act of the Council, the applicant's wish to invoke the WTO Agreements is in no way inadmissible.

- Substance: (a) the pleas regarding breach of the provisions of the World Trade Organisation Agreements and (b) the pleas claiming a connection with the alleged contradictions between the rules of the agreements

25. (a) The Portuguese Government claims that the contested decision is contrary to the WTO rules on four grounds. It disputes the lawfulness of the option granted to the Indian government to reintroduce alternative specific duties and to grant export licences under procedures not provided for in the WTO Agreements on the ground that these powers are contrary both to Article II of the GATT and the provisions of the Agreement on Import Licensing Procedures (which appears in Annex 1A to the WTO Agreement). The Portuguese Government claims, furthermore, that the imbalance between the commitments undertaken by the Community and those undertaken by India and Pakistan on opening up their respective textiles markets is unlawful, particularly in respect of the option of granting requests for exceptional flexibility. Finally, it relies on a breach of the obligation to publish international agreements provided by Article X of the GATT.

26. Before considering whether these pleas are well-founded, it is appropriate to recall briefly the text of the Memoranda of Understanding.

The Memorandum of Understanding with Pakistan includes a series of commitments by the Community and by Pakistan. In particular, Pakistan undertakes to remove all quantitative restrictions on a number of textile products listed in detail in Annex II to the Memorandum of Understanding. However, 'should a critical situation arise in the textiles industry of Pakistan or in

relation to the balance of payments situation of Pakistan, the Government of Pakistan retains the right under GATT 1994 and the WTO to reintroduce, after necessary consultations with the European Commission, quantitative restrictions‘ (paragraph 4). The Commission, on the other hand, is committed to ensuring that 'all restrictions currently affecting the importation of products of the handloom and cottageindustries of Pakistan are removed before entry into force of the WTO‘ (paragraph 7) and to giving 'favourable consideration to requests which the Government of Pakistan might introduce in respect of the management of existing quota restrictions for exceptional flexibility‘ (paragraph 6).

The Memorandum of Understanding with India establishes that the Indian Government will bind its tariffs on the textiles and clothing items listed in the Attachment to the Memorandum of Understanding, and that 'these rates will be notified to the WTO Secretariat within 60 days of the date of entry into force of the WTO‘. However, 'if the integration process envisaged in Article 2, subparagraphs 6 and 8 of the WTO Agreement on Textiles and Clothing does not materialise in full or is delayed, duties will revert to the levels prevailing on 1 January 1990‘. Furthermore, the Indian Government may 'introduce alternative specific duties for particular products‘ and those duties 'will be indicated as a percentage ad valorem or an amount in INR per item/square metre/kg‘ (paragraph 2). The Indian Government agrees, 'if the EC considers that such duties are having an adverse impact‘ on its exports of the products in question, 'to address the concerns raised in a mutually acceptable manner‘ with the Community (paragraph 2). The European Community, for its part, agreed to remove, with effect from 1 January 1995, all restrictions currently applicable to India's exports of handloom products and cottage industry products as referred to in Article 5 of the EC-India agreement (paragraph 5). The Community undertakes to give favourable consideration to requests 'which the Government of India might introduce for exceptional flexibilities, in addition to the flexibilities applicable under the bilateral textiles agreement‘ up to the specific amounts set out in the Memorandum of Understanding. It is presumed, lastly, that the Indian Government will invoke such exceptional flexibilities in the order of carry-over, inter-category transfer and carry forward to the extent of the possibilities existing on the basis of the utilisation of quotas (paragraph 6).

27. The Portuguese Government maintains, in its first plea for annulment, that the fact that paragraph 2 of the Memorandum of Understanding with India provides that it may 'introduce alternative specific duties for particular products‘ and that it may levy those duties on the basis of the value of the goods or on the basis of 'export data to be provided by the EC‘, constitutes a right which clearly goes against the requirement to bind customs duties laid down in Article II of the GATT. In its view, the provision that the Indian Government may modify the system of duties if these 'have an adverse impact‘ on exports from the Community does not prevent the system from being unlawful.

The second plea for annulment invoked by the Portuguese Government, as already mentioned, concerns the procedure for granting export licences. It is clear from the annex to the Memorandum of Understanding with India that India will continue to issue special import licences (known as SILs). According to the Portuguese Government, these licences are normally issued by the Government to Indian exporters who sell them on to operators from other countries or to Indianimporters: they are thus not issued to foreigners who intend to export to India, but to Indian operators who then sell them on at a price that is not subject to control by the national authorities. This system, Portugal claims, is contrary to the rules of procedure laid down in the agreement which appears in Annex 1A to the WTO Agreement.

That agreement makes provision for two import licensing procedures: the first requires licences to be granted automatically to all operators who apply for them (Article 2); the second does not make provision for licences to be granted but prohibits the State from introducing limits greater than a fixed quantitative restriction for the trade in its products. As part of this procedure States must publish the overall amount of quotas to be applied by quantity and/or value, the opening and closing dates of quotas, and any change thereof [Article 3(5)(b)]. Once the licensing system has been set up, any 'person, firm or institution which fulfils the legal and administrative requirements of the importing Member shall be equally eligible to apply and to be considered for a licence‘. If the licence application is not approved, the applicant may ask why and may bring an appeal or apply for a review in accordance with the domestic legislation or internal procedures of the importing Member [Article 3(5)(e)].

28. The third alleged ground of incompatibility with the WTO rules concerns the balance between the commitments entered into by the contracting parties. The Portuguese Government considers that India and Pakistan have in fact agreed to a 'random‘ opening up of their market, since, on the one hand, India has reserved the right to reintroduce in an arbitrary and discretionary manner specific duties and to maintain the system of special licences and, on the other hand, the Community has undertaken to grant exceptional flexibilities, that is to say to respond to requests for derogations from tariff quotas fixed for the import of textile products from these countries. Such a system of flexibility would create a global import quota for all categories of textile products, thwarting the quantitative limits placed on each textile category to protect Community producers, and would also lead to a sharp acceleration of the liberalisation process agreed within the framework of the Agreement on Textiles and Clothing attached to the WTO Agreement. Such an imbalance would clearly be contrary to Articles 4 and 7 of the ATC.

I should point out that Article 4(2), cited above, states that 'the introduction of changes, such as changes in practices, rules, procedures ... , in the implementation

or administration of those restrictions notified or applied under [the ATC] should not: upset the balance of rights and obligations between the Members concerned under this agreement‘ or 'disrupt trade‘ in textiles. Article 7, in particular paragraph 1, states, furthermore, that all Members are to take 'such actions as may be necessary to abide by GATT 1994 rules‘. They must also 'avoid discrimination against imports in the textiles and clothing sector‘ (Article 7(1)(c)).

29. Before considering these claims, which will be evaluated together given the clear link between the various arguments, it should be recalled that the WTO provisions invoked as a criterion of the lawfulness of the Community acts are clear, precise and unconditional: Article II of the GATT Agreement explicitly prohibits the introduction of new import restrictions, while the Agreement on Import Licensing Procedures attached to the WTO Agreement imposes specific obligations on contracting states to adopt an internal system of licensing. Articles 4 and 7 of the ATC explicitly prohibit measures which might upset the 'harmonised system‘ of the WTO and the liberalisation process provided for by the agreement itself.

In view of the content of the contested bilateral agreements - in particular the agreement concluded with India - and of the multilateral agreements cited above, it is impossible to avoid the conclusion that there are indeed systemic disparities between the WTO provisions invoked by Portugal and the provisions of the bilateral agreements in all the aspects that Portugal raises. In my opinion, however, such disparities do not automatically signal incompatibility between the WTO multilateral agreements and the bilateral agreements in issue, but simply a modification of the earlier agreements. According to international customary law, parties to a multilateral treaty may, in principle, modify the treaty as between themselves by means of a subsequent bilateral agreement, as provided by Article 41(1)(b) of the Vienna Convention on the Law of Treaties which transcribes a rule of customary law, provided that the modification in question '(i) does not affect enjoyment by the other parties of their rights under the treaty or the performance of their obligations; and (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole‘. For a bilateral agreement to be considered incompatible with a prior multilateral agreement therefore - solely with regard to the aspects of interest in the present case - the bilateral agreement must materially inhibit the effects of the first agreement, in particular with regard to the rights and obligations entered into by contracting parties which are not parties to the second agreement. However, as the Commission has rightly pointed out, any incompatibility is not, from the point of view of international law, a ground for the subsequent bilateral agreement to be declared invalid although it might give rise to a breach of international law by the Community vis-à-vis the parties to the earlier multilateral agreement.

In the present case it seems clear that the agreements between the Community and India and the Community and Pakistan do not affect relations between the contracting parties to the two bilateral agreements and the WTO Agreements in any way, nor do they compromise the reciprocal commitments entered into within the framework of the international negotiations. In this connection, the fact that a Community Member State, such as Portugal, suffers as a result of the content of the bilateral agreements is, contrary the Portuguese Government's contentions, irrelevant for the purpose of considering the lawfulness of the two bilateral agreements. Although Member States of the Community have acceded autonomously to the WTO Agreements, on the basis of their being mixedagreements, they cannot consider themselves as third parties with regard to a bilateral agreement, such as the one in issue, concluded by the Community after the entry into force of the multilateral agreements. The disputed agreements were in fact concluded by the Council on the basis of its exclusive powers in the area of the common commercial policy. These powers were expressly conferred on the Council under Article 113 of the Treaty and have therefore been transferred directly to it by the Member States. If follows that Portugal must be regarded as a contracting party not only to the WTO multilateral agreements but also to the bilateral agreements concluded with India and Pakistan respectively.

In respect of the content of the rules of the agreements at issue, I should point out that the bilateral agreements, contrary to what Portugal maintains, further the integration of the textiles markets of the contracting states and are therefore in line with the objectives of the multilateral agreements invoked, in respect of their relations both with one another and with other Member countries of the WTO. It is apparent from the statements of the parties, that India and Pakistan offered, as a concession to initiate the liberalisation process, to set nominal quotas to begin with and that the decision to negotiate bilateral agreements with these States was taken precisely with a view to achieving the objective of the WTO Agreement of gradually opening up the respective markets completely. It appears, therefore, that the modest initial concessions which India is required to make are, in any case, less than those provided for in the bilateral agreement. The fact then that, according to the bilateral agreement, India, in spite of its commitment to bind existing duties (rates hitherto notified to the WTO Secretariat), may introduce new duties and thus fail to honour the commitment to bind them is certainly not in line with the general aims of the WTO system. However, the introduction of such duties does not appear to affect the process of liberalisation of the textiles trade initiated by the multilateral agreement, given the non-specific and provisional nature of the measure. In the same way, the option in the agreement with India for that country to grant to 'special import licenses‘ in accordance with a procedure - described by the Portuguese Government and not contested by other contracting parties - which provides that recipients of licences are to be Indian operators and not exporters, is

not based on the general rules of procedure laid down in the multilateral agreement. Nevertheless, that provision does not appear to have a bearing on the effects of the WTO Agreement: applications for licences are for a fixed period of time (see the 'Special Import Licences' column in the annex to the agreement) and do not affect the whole range of products.
As regards the alleged 'imbalance' between the benefits for each of the contracting parties, it is clear from the text of the two Memoranda of Understanding that there is a considerable discrepancy between the periods of time agreed on for opening up their respective markets. The memoranda, in fact, make provision for a commitment by the Community to remove current restrictions on the import of cottage industry textile products and, furthermore, to grant any requests for exceptional flexibility, that is to say derogations from the import quotasystems established by the Community. In return for these commitments, Pakistan states that it is prepared to remove all quantitative restrictions on a fixed list of textile products attached to the memorandum, while India merely undertakes not to introduce new duties and therefore not to place any further restriction on the import of textile products, while reserving the option to reintroduce certain specific duties ad valorem, and in particular to issue the Special Import Licences referred to above. However, an imbalance of this kind does not constitute grounds for declaring the memorandum invalid, since international treaty law does not require an exact match between the benefits gained by the contracting parties and since the WTO rules - particularly Articles 4 and 7 of the ATC invoked by the Portuguese Government - do not, even implicitly, prohibit the conclusion of bilateral agreements of this kind, but prohibit only measures which may affect the operation of the multilateral agreement by restricting the market liberalisation process envisaged in the WTO Agreements. For the reasons explained earlier, I believe that the memoranda in issue do not produce an effect of this kind. (31) Moreover, contrary to what the Portuguese Government argues, the WTO provisions invoked do not prohibit a flexible system, that is to say derogations from import quotas, such as the system provided for by the Agreements with India and Pakistan.
30. On the last plea of illegality invoked by the Portuguese Government, concerning the failure to comply with the requirement to publish international agreements provided for by Article X of the GATT, (32) I simply refer to my earlier remarks, with regard to the facts, that Portugal's plea of a breach of the same requirement in Community law was unfounded. It is true that the decision, together with the two Memoranda of Understanding, was published after Portugal brought the action and four months after its adoption, but a delay of this kind is not excessively lengthy and, in my opinion, does not justify annulment of the decision on the grounds that it is in breach of the international rules invoked.
31. (b) I turn now to the pleas concerning breach of principles of Community law which are closely connected to the arguments put forward in support of the alleged conflict between the bilateral agreements concluded with India and Pakistan and the WTO Agreements. These pleas concern a breach of the principle ofcooperation in good faith in relations between the Community and the Member States, breach of the principle of the protection of legitimate expectations, breach of the principle of economic and social cohesion and, finally, breach of the principle of equality between economic operators.
32. In respect of the plea concerning cooperation in good faith in relations between the Community institutions and the Member States, the Portuguese Government maintains that the bilateral agreements were concluded without regard for its position on opening up the Community market to India and Pakistan. Portugal recalls that it stated on a number of occasions that it was willing to accede to the WTO Agreements only if the Community did not derogate from the commitments it had made in the multilateral framework by offering these two third countries concessions, in return for opening up their markets, that set quantitative limits that were higher than those proposed in the WTO forum. Portugal claims that it expressly stated its official position at the Council meeting of 15 December 1993 at which it was decided to accede to the WTO agreements, and in a letter of 7 April 1994 from the Portuguese Minister for Foreign Affairs to the Council. (33) Despite these statements, the Council, Portugal claims, negotiated the agreements with India and Pakistan, providing for acceleration of the process of opening up the textiles market and thus dismantling the Community system of tariff quotas for these products.
The Council does not dispute the Portuguese Government's reconstruction of events but emphasises that the position expressed by Portugal, in particular in the letter from the Minister for Foreign Affairs of 7 April 1994, is of a political nature and led to the adoption of Regulation 852/95 whereby the Council granted a series of subsidies to the Portuguese textile industry. (34) The Council maintains that, since the contested decision is a commercial policy measure, it could be adopted byqualified majority of the members of the Council (Article 113(4) of the Treaty). To recognise that Portugal's position was relevant to the adoption of the decision would mean calling the legal basis of the contested measure into question, as it would no longer require a qualified majority but unanimity for it to be adopted.
The arguments of the Council appear to be well founded. The position of the Portuguese Government, and in particular the Minister's statement of 7 April 1994 quoted above, are of a merely political nature and as such, therefore, are not relevant for the purpose of determining the lawfulness of the decision. Even if that position were held to produce legal effects, it would constitute a reservation on Portugal's accession to the WTO Agreements and could not therefore affect the validity of the contested bilateral agreements. Furthermore, the principle of cooperation between institutions and States that has been invoked is intended to ensure

that the objectives of the Treaty are achieved; it does not affect the choice of the legal basis for Community acts or the legislative procedure to be followed in adopting them. (35) In the present case, the contested decision is clearly a common commercial policy measure which, under Article 113(4) of the Treaty must be adopted by qualified majority. It follows that opposition to it by one Member State does not constitute a defect which could justify its annulment. For this reason the plea for annulment should be held to be unfounded.

33. The Portuguese Government also claims that, in adopting the contested decision, the Council breached the principle of protection of legitimate expectations in that the agreements concluded with India and Pakistan entailed a significant acceleration of the process of liberalising the trade in products from those countries and would therefore disappoint all the expectations Community operators in the sector had formed on the basis of the gradual opening up of the market envisaged by the WTO Agreements, in particular the ATC Agreement, and the Community legislation in force, particularly Regulation No 3030/93 as amended by Regulation No 3289/94 which transposes the ATC into Community law. The Council points out in this connection that the bilateral agreements do not materially affect the content of the commitments entered into at multilateral level, as regards either gradual opening up of the contracting parties' markets or the possibility of granting exceptional flexibilities in the form of derogations to quantitative import limits, and that they do not greatly affect the future framework of the WTO Agreements. The Council doubts whether operators in the sector could have been unaware of the opening of bilateral negotiations between the Community and India and Pakistan with a view to reaching agreements on the trade in textiles, since the Director General of the GATT had invited the Community to conclude its bilateral negotiations with these two third countries as long ago as December 1993.

I feel I should make two points on this issue. First, a regulation such as the one in this case, which fixes import quantities in a general way by category of products' cannot be regarded as constituting concrete and specific expectations on the part of the various economic operators capable of founding a legitimate expectation in the provision in force not being changed. According to settled case-law, compliance with the principle of the protection of legitimate expectations cannot justify the immutability of a provision, especially in sectors - such as the importation of textiles - where it is necessary to adapt the rules constantly by reference to changes in the economic situation and such changes may reasonably be expected. (36) Second, although under the terms of the bilateral agreements, as a result of the various stages of opening up the Community market and the express option of granting derogations from import tariff quotas, the Community has allowed its market to be opened up more rapidly than was envisaged in the multilateral agreements, nevertheless, given the extent of the discrepancy in the timetables set for liberalisation, this does not, as we have seen, imply actual conflict with WTO provisions, in particular those of the ATC. It follows that no appreciable differences in treatment can be established between Indian and Pakistani products, on the one hand, and those from other States which have acceded to the WTO, on the other, and in any event no differences such as to prejudice the expectations of the operators concerned.

34. Portugal then claims a breach of the principle of economic and social cohesion set out in Articles 2, 3(j) and 130a to 130e of the Treaty. Portugal maintains that the fact that the Community did not adhere to the policy expressed during the negotiation of the multilateral agreements, in the course of which the interests of economic operators of different regions of the Community were weighed up, led to the penalisation of one particular type of operator, namely the Portuguese textiles industry. This, it claims, led to the need to adopt Regulation No 852/95 which made provision for grants to Portuguese operators in the sector.

This plea seems to me to be clearly unfounded. It is true that the Community has a duty in its actions, particularly when legislating, to ensure economic and social cohesion, as provided under Articles 2 and 3 of the Treaty; a political objective of this kind, however, is not a principle of law and therefore a criterion of the lawfulness of Community measures. It follows that, in this case, the decision cannot be annulled merely by reason of the fact that it harms the market position of a category of economic operators in a particular area of Community territory.

35. These considerations lead me to conclude that Portugal's last plea, on breach of the principle of equality between economic operators, is likewise unfounded. On this point, the Portuguese Government maintains that the contested decision favours wool producers over cotton producers since, in the bilateralagreement, the Indian market is to be opened up only for the former category of products. In my opinion a decision such as this, concerning import quotas having effects such as to favour a particular category of producers at the expense of those operating in the same sector but in different markets, cannot be regarded as illegal on the ground that it supposedly discriminates against those to whom it is addressed. The principle of non-discrimination in fact requires of the Community legislature 'that comparable situations are not treated in a different manner unless the difference in treatment is objectively justified‘. (37) In this case, operators in the sector work in two distinct markets, wool and cotton, and therefore any economic prejudice suffered by one of the two categories of producers does not constitute a breach of the principle of non-discrimination.

**Conclusion**

36. In the light of the foregoing considerations, I propose that the Court should:

- dismiss the application;
- order the Portuguese Republic to pay the Council's costs;
- order each of the interveners to bear its own costs.

1: Original language: Italian.
2: - OJ 1996 L 153, p. 47.
3: - The Community signed the Multifibre Arrangement by Decision of the Council of 21 March 1974 concluding the arrangement regarding international trade in textiles (OJ 1974 L 118, p. 1).
4: - The Protocols extending the Multifibre Arrangement were concluded on 14 December 1977, 22 December 1981, 31 July 1986, 31 July 1991, 9 December 1992, and, finally, on 9 December 1993. The Community signed all the Protocols.
5: - OJ 1994 L 336, p. 1.
6: - Under Article 8(1) of the ATC, '[i]n order to supervise the implementation of this agreement, to examine all measures taken under this agreement and their conformity therewith, and to take the actions specifically required of it by this agreement, the Textiles Monitoring Body ("TMB") is hereby established. The TMB shall consist of a Chairman and 10 members. Its membership shall be balanced and broadly representative of the Members and shall provide for rotation of its members at appropriate intervals. The members shall be appointed by Members designated by the Council for Trade in Goods to serve on the TMB, discharging their function on an ad personam basis'.
7: - Flexibility is understood to mean the option to grant licences for the import of products in quantities greater than those set out in the import quotas.
8: - Article 5 of the agreement concluded between the Community and the Republic of India, under the Council Decision of 11 December 1986 concerning the provisional application of the agreement between the European Economic Community and the Republic of India on trade in textile products (OJ 1988 L 267, p. 1) provides that, with reference to Article 12(3) of the Geneva Agreement regarding international trade in textiles, concluded by the Community under the Council Decision of 21 March 1974 (OJ 1974 L 118, p. 1), import quotas 'will not apply to handloom fabrics of the cottage industry, hand-made cottage industry products made of such handloom fabrics and traditional folklore handicraft textile products'.
9: - OJ 1993 L 275, p. 1.
10: - Council Regulation (EC) No 3289 of 22 December 1994 amending Regulation (EEC) No 3030/93 on common rules for imports of certain textile products from third countries (OJ 1994 L 349, p. 85).
11: - OJ 1993 C 166, p. 1.
12: - For resolutions which, on the basis of their content, are of a binding nature see judgments of the Court of Justice, in Case 108/83 Luxembourg v European Parliament [1984] ECR 1945, paragraph 23, and Joined Cases C-213/88 and C-39/89 Luxembourg v European Parliament [1991] ECR I-5643, paragraphs 25 to 27.
13: - Commission Regulation (EC) No 3053/95 of 20 December 1995 amending Annexes I, II, III, V, VI, VII, VIII, IX, and XI of Council Regulation (EEC) No 3030/93 on common rules for imports of certain textile products from third countries (OJ 1995 L 323, p. 1). The regulation was contested by the Portuguese Republic in an application lodged at the Court Registry on 21 March 1996 (Case C-89/96).
14: - Judgment in Case C-280/93 [1994] ECR I-4973.
15: - Judgment in Case 181/73 Haegeman v Belgium [1974] ECR 449, in particular paragraphs 2 to 6.
16: - See the judgment in Haegeman, cited above, paragraph 6.
17: - See judgments in Case 87/75 Bresciani [1976] ECR 129, paragraph 16; Case 270/80 Polydor v Harlequin [1982] ECR 329, paragraph 14 et seq.; Case 17/81 Pabst [1982] ECR 1331, paragraphs 26 and 27; Case 104/81 Kupferberg [1982] ECR 3641, paragraphs 11 to 14 and 23; Case 12/86 Demirel [1987] ECR 3719, paragraph 14; Case 192/89 Sevince [1990] ECR I-3461, paragraph 15; Case C-18/90 Kziber [1991] ECR I-199, paragraph 15; Case C-432/92 Anastasiou [1994] ECR I-3087.
18: - See judgment in Joined Cases 21/72 and 24/72 International Fruit [1972] ECR 1219.
19: - See judgment in Case 9/73 Schlüter [1973] ECR 1135, paragraph 27.
20: - See judgments in Case 266/81 SIOT [1983] ECR 731, paragraph 12; Joined Cases 267/81 and 269/81 SAMI [1983] ECR 801, paragraphs 23 and 24; Case C-469/93 Chiquita Italia [1995] ECR I-4533, paragraphs 25 to 29.
21: - The judgment in Germany v Council [1994] expressly refers to two previous judgments which, at first sight, constitute exceptions to the general case-law on the legal effect of the GATT rules. The first, in Case 70/87 Fediol v Commission [1989] ECR 1781 dates back to 22 June 1989. In that case the federation Fediol was challenging the lawfulness of a Commission decision rejecting a complaint brought under Article 3(5) of Council Regulation (EEC) No 2641 of 17 September 1984 on the strengthening of the common commercial policy with regard in particular to protection against illicit commercialpractices (OJ 1984 L 252, p. 1). Article 2(1) of that regulation establishes that any international trade practices attributable to third countries which are incompatible with international law or with the generally accepted rules are to be considered unlawful. The Court ruled that the combined provisions of Articles 2 and 3 of the regulation entitle the economic agents concerned 'to rely on the GATT provisions in the complaint which they lodge with the Commission in order to establish the illicit nature of the commercial practices which they consider to have harmed them'. In that case the Court affirmed its jurisdiction to exercise 'powers of review over the legality of the Commission's decision applying those provisions' (paragraph 22). The Court therefore held that although the GATT rules do not in general have direct effect, the express reference in Regulation 2641/84 confers on individuals the right to invoke those provisions before a court. The judgment appears to be in line with the general legal view on the lack of direct effect of the GATT rules. The other judgment cited by the Court in Germany v Council, the judgment in Case C-

69/89 Nakajima [1991] ECR I-2069 is quite different. In that case the Court proceeded on the assumption that the provisions of the GATT had the effect of binding the Community and that this also applied to the Anti-Dumping Code 'adopted for the purpose of implementing Article VI of the GATT‘. It follows, according to the Court, that when a measure adopted in order to comply with international obligations arising from that code is challenged, the Court must 'ensure compliance with the General Agreement and its implementing measures‘ and consequently 'examine whether the Council went beyond the legal framework thus laid down ‘ and whether by adopting the disputed provision, it acted in breach of 'the Anti-Dumping Code‘. In that case, Nakajima had claimed that Council Regulation (EEC) No 2423 of 11 July 1988 (OJ 1988 L 209, p. 1) was at variance with the Anti-Dumping Code implementing Article VI of the General Agreement on Tariffs and Trade, approved on behalf of the Community in Council Decision 80/271/EEC of 10 December 1979 concerning the conclusion of the Multilateral Agreements resulting from the 1973 to 1979 trade negotiations (OJ 1980, L 71, p. 1). That judgment is, in my opinion, more consistent with the general case-law on international agreements and is based on different criteria from those used to evaluate the effects of the GATT with regard to Community secondary legislation.

22: - Recently, the Court, replying to a question of validity arising from conflict between a Council regulation suspending an international agreement concluded with Yugoslavia and the rule of customary international law contained in Article 65 of the Vienna Convention on the Law of Treaties, held that the possibility of relying on rules of customary international law is separate from the question of their direct effect, for these rules are nevertheless binding on the Community which must respect international law in the exercise of its powers. The Court held that an individual may invoke fundamental rules of customary international law against the disputed regulation, which was taken pursuant to those rules and deprives [him] of the rights to preferential treatment (judgment of 16 June 1998 in Case C-162/96 Racke v Hauptzollamt Mainz, not yet published in the ECR, paragraph 48).

23: - The Agreement on Textiles and Clothing, as stated above, provides for its own dispute settlement system which is in accordance with the general system (pursuant to Article 1(2) of the Memorandum of Understanding cited above on the settlement of disputes regarding the WTO agreements). A Textiles Monitoring Body (TMB) is established which, on the basis of 'information‘ and 'notifications‘ by parties to the agreement and in the absence of 'any mutually agreed solution in the bilateral consultations‘ provided for in the agreement, and at the request of either Member, 'shall make recommendations to the Members concerned‘ (Article 8 of the ATC).

24: - In cases where claims of a breach of WTO rules have been ruled inadmissible, the Court has admitted that it has jurisdiction in two respects. First it declared it was competent, in the context of preliminary ruling proceedings, to interpret Article 50 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (Annex 1C to the WTO Agreement), which provides for national courts to adopt provisional measures to prevent an infringement of an intellectual property right. According to the Court, as it is solely for the national court to decide whether to adopt such measures, the Court is bound to give a ruling on questions submitted for preliminary ruling on matters of interpretation relating to such a decision. Furthermore, the Court states that, 'where a provision can apply both to situations falling within the scope of national law and to situations falling within the scope of Community law, it is clearly in the Community interest that, in order to forestall future differences of interpretation, that provision should be interpreted uniformly, whatever the circumstances in which it is to apply‘ (see judgment in Case C-53/96 Hermès [1998] ECR 3603, paragraphs 31 and 32). In a later judgment in a direct action by Italy contesting a Council Regulation on import quotas for rice in which the conflict with Article XXIV(6) of the GATT was invoked and in particular paragraph 5 et seq. of the Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade of 1994, the Court refused to admit the plea of inadmissibility in the action for annulment, stating that the contested regulation was 'intended to implement a particular obligation entered into within the framework of GATT‘ and that, therefore, 'the Court must review the lawfulness of the Community act in question from the point of view of the GATT rules‘ (see judgment of 12 November 1998 in Case C-352/96 Italy v Council, not yet published in ECR, in particular paragraphs 19 to 21).

25: - See, lastly, judgment of 16 June 1998 in Racke, cited above, paragraphs 45 to 48.

26: - See, inter alia, judgment of the International Court of Justice of 3 February 1994, Libyan Arab Jamahiriya v Chad.

27: - See the Opinion of Advocate General Tesauro on this subject delivered on 13 November 1997 in Case C-53/96 Hermès, paragraph 24.

28: - Under Article 60 of the Vienna Convention, a material breach of a bilateral treaty by one party 'entitles‘ the other party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in relations between itself and the defaulting State [paragraph 2(b)]. In a case of this kind, the Community institutions are entitled to decide to suspend the agreement and to adopt measures and conduct contrary to the provisions of the WTO Agreement in respect of individual States who have breached these provisions.

29: - It is true that that in Community case-law, failure by courts of third countries to apply international rules of an agreement has not been seen as a reason for precluding the possibility that such provisions may be binding. In its judgment, in Kupferberg the Court stated that, '[a]lthough each contracting party is responsible for executing fully the commitments which it has undertaken it is nevertheless free to determine the legal

means appropriate for attaining that end in its legal system‘. However, 'the fact that the courts of one of the parties consider that certain of the stipulations in the agreement are of direct application [and may therefore be invoked by individuals] whereas the courts of the other party do not recognise such direct application is not in itself such as to constitute a lack of reciprocity in the implementation of the agreement‘ (paragraph 18). It appears then that the Court has decided that failure by the courts of a contracting state to recognise the possibility of invoking rules of the agreement does not constitute a breach which may justify failure to comply with that agreement by the Community institutions and thus preclude individuals from invoking its provisions within the Community legal order. As has rightly been noted in academic writings, these remarks by the Community judicature should not be interpreted as meaning that in the Community legal order any possibility of relying on rules of an agreement before the court of a third country should be completely ruled out, and consequently that if a national judicature fails to comply with an international rule, this can justify a breach by a national court or the Community of that same international provision. The paragraph should be interpreted instead as meaning that ruling out the option to invoke such a rule before the courts does not mean a third country may not have provided other instruments to defend the interests and rights of individuals and that, therefore, the existence of an alternative system of protection of these rights prevents any breach by the third country from having extreme consequences. See the Opinion of Advocate General Tesauro in the Hermès case, cited above, paragraphs 31 et seq.

30: - On the possibility of establishing systems of dispute settlement within the framework of an international agreement, in parallel to that provided by the Treaty, see the judgment in Kupferberg, cited above, in which the Court held that the establishment within the framework of the agreement between the European Economic Community and Portugal of 22 July 1972 of joint committees, responsible for the administration of the agreements and for their proper implementation was not sufficient 'to exclude all judicial application of that agreement‘ (see paragraphs 19 and 20); see too Opinion 1/91 of 14 December 1991 on the draft agreement between the Community and the countries of the European Free Trade Association on the creation of the European Economic Area, [1991] ECR I-6079, in which the Court stated that, 'the Community's competence in the field of international relations and its capacity to conclude international agreements necessarily entails the power to submit to the decisions of a court which is created or designated by such an agreement as regards the interpretation and application of its provisions‘. So an international agreement providing for such a system of courts is in principle compatible with Community law. However, in so far as the agreement establishes a judicial system whose decisions are binding on the Court of Justice in respect of its interpretation and application of rules that are an integral part of the Community legal order, the agreement conditions the interpretation of Community rules and therefore 'conflicts with Article 164 of the EEC Treaty and, more generally, with the very foundations of the Community‘ (see Section V of Opinion 1/91 [1991], ECR I-6104).

31: - In support of the arguments concerning the unlawfulness of the imbalance between concessions by the contracting parties to the two bilateral agreements at issue, Portugal, in its reply, invokes a breach of Article XXVIII of the GATT. Such a plea, advanced at this stage is not only too late and therefore inadmissible, it is also unfounded in that the reference to 'concessions granted on a reciprocal and mutually advantageous basis‘ in paragraph one of the Article does not, in my opinion, concern equivalence of benefits, but reciprocity in discharging the obligations assumed under the GATT and therefore actual observance of the concessions granted in the context of the agreement.

32: - Article X of the GATT specifically provides that: 'Agreements affecting international trade policy which are in force between the Government or a governmental agency of any contracting party and the government or governmental agency of any other contracting party shall also be published.‘

33: - The letter of 7 April 1994 from the Portuguese Minister for Foreign Affairs stated that: 'Portugal's acceptance of this compromise, including dismantling the Multifibre Arrangement, was closely tied to the observance of three conditions: effective and complete opening up of all markets, strengthening the GATT rules and discipline, and use of the Community system of generalised preferences as a means of correcting imbalance in the case of any breaches by third countries. I note with concern, in particular in the textiles sector, unfavourable developments in that certain contracting parties are not fulfilling obligations they agreed to, refusing to open up their markets. I am referring specifically to the case of India and Pakistan which, so far, still have not put forward their proposals. The European Union, acting through the Commission, should oblige our partners to fulfil all the obligations they entered into on 15 December, on the basis of the policy established by the Council. You will understand that these commitments are not negotiable and that the European Union cannot offer any further concessions, in particular in the most sensitive sectors, such as textiles and clothing‘.

34: - Council Regulation (EC) No 852/95 of 10 April 1995 on the grant of financial assistance to Portugal for a specific programme for the modernisation of the Portuguese textile and clothing industry (OJ 1995 L 86, p. 10).

35: - On the implementation by the Community institutions of the requirement of cooperation in good faith under Article 5 of the judgment, see Judgments in Case 230/81 Luxembourg v Parliament [1983] ECR 255, paragraphs 36 to 38, Joined Cases 358/85 and 51/86 France v Parliament [1988] ECR 4821, paragraphs 34 to 36 and the Order of the Court in Case C-2/88 Zwartveld and Others [1990] ECR I-3365, paragraphs 17 to 21.

36: - See my Opinion, delivered on 16 July 1998, in Case C-159/96 Portugal v Commission, paragraphs 79 to 81.
37: - See in particular judgment in Case C-280/93 Germany v Council [1994] ECR I-4973, paragraph 67.